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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

WORLD AIRWAYS, INC.; TRANS INTERNATIONAL AIRLINES, INC.; SATURN AIRWAYS, INC.; *et al.*, *Petitioners*,

v.

PAN AMERICAN WORLD AIRWAYS, INC.; TRANS WORLD AIRLINES, INC.; and AMERICAN AIRLINES, INC.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court below (1119a-1143a)* is reported at 380 F. 2d 770. The opinions of the Civil Aeronautics Board in this case (Supplemental Air Service Proceeding, E-23350, March 11, 1966, 332a-384a; on reconsideration, E-23600, 517a-531a; Supplemental Air Service Proceeding, E-24237, approved by the President, Septem-

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* Numbers with the suffix "a" refer to the printed appendix.

ber 27, 1966, 543a-565a; Reopened Transatlantic Investigation (All-Expense Tour Phase), E-24240, approved by the President, September 27, 1966, 1060a-1082a) have not yet been reported in the C. A. B. reports.

JURISDICTION

The judgment of the court below was entered on July 20, 1967 (1144a). Timely petitions for rehearing and rehearing in banc were denied on September 29, 1967 (1146a, 1148a). The petition for certiorari herein was filed on November 7, 1967, granted on January 29, 1968, and consolidated for argument with Nos. 946 and 969. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) and 49 U.S.C. § 1486(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board, in conformity with Presidential approval, may issue certificates of public convenience and necessity for overseas and foreign "supplemental air transportation" (defined by Section 101(33) of the Federal Aviation Act as "charter trips in air transportation * * * to supplement * * * scheduled service") which authorize "inclusive tour charters" as defined and limited in the orders here involved.

2. Whether under the doctrine of *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, the Board's orders here were reviewable only by the President and not by the courts.[1]

---

[1] This "threshhold jurisdictional question" was specifically reserved by petitioners. Pet. 2, note 1.

STATUTES AND REGULATIONS INVOLVED

1. The pertinent portions of the Federal Aviation Act of 1958 as amended are set forth in the Appendix, *infra,* pp. 59-61.

2. Part 378 of the Board's Special Regulations, "Inclusive Tours by Supplemental Air Carriers and Tour Operators," as amended, is set forth at 411a-436a, 538a-542a, 604a-607a, and 1094a-1096a.

3. Part 208 of the Board's Economic Regulations, "Terms, Conditions and Limitations of Certificates to Engage in Supplemental Air Transportation," as amended, is set forth at 437a-484a, 532a-537a and 597a-603a.

4. Part 295 of the Board's Economic Regulations, "Transatlantic Supplemental Air Transportation," as amended, is set forth at 755a-776a, 898a-926a, and 1090a-1093a.

STATEMENT

Petitioners, supplemental air carriers, are the holders of certificates of public convenience and necessity, issued by the Civil Aeronautics Board (hereinafter "the Board") with the approval of the President (under Sec. 801 of the Act [49 U.S.C. § 1461, *infra,* p. 60]), which authorized them to engage in "supplemental air transportation (including tour authority) with respect to persons and property" in overseas and foreign transportation.

Similar certificates of public convenience and necessity, with identical inclusive tour authority, were issued these petitioners by the Board in respect of domestic travel. Such certificates, which did not require Presidential approval, were challenged by all of the present respondents as *ultra vires;* that challenge was rejected by the District of Columbia Circuit. *American Airlines, Inc.* v. *Civil Aeronautics Board,* 365 F. 2d 939.

The present certificates were thereafter challenged in the Second Circuit by the respondents, all of the petitioners

intervened, and on precisely the same statutory materials that court held that the Board lacked power to present those certificates to the President. *Pan American World Airways* v. *Civil Aeronautics Board*, 380 F. 2d 770. This Court granted certiorari to resolve the conflict.

Briefly, because we discuss below in detail the Board's comprehensive regulations on the matter (*infra*, pp. 24-29), "inclusive tours" are synonymous with the familiar "all-expense" or "package" tour, which includes not only the basic air transportation, but various land arrangements, such as hotel accomodations and the like; while "inclusive tour charters" are arrangements by which the air carrier charters the aircraft to a "tour operator," a travel specialist who sells the entire tour to the public for a single price.

A. BACKGROUND OF THE PROCEEDINGS

The present case represents the culmination of over twenty years of regulation, litigation, and legislation, all directed to determining the role that supplemental air carriers such as petitioners, who at earlier stages of their development were known as "non-scheduled" or "large irregular" carriers, may properly play in the air transport industry.

The earlier history of the supplemental air carriers is set forth, with full documentation to the administrative and judicial proceedings therein involved, in Point IA of the Board's brief in No. 946, in which the Board seeks reversal of the same judgment that is under review in this case. It is therefore sufficient for us to note that the decision which brought matters to a head was *United Air Lines* v. *Civil Aeronautics Board*, 278 F. 2d 446 (D.C. Cir.), inasmuch as that decision placed in doubt the entire statutory basis for continued operations by supplemental carriers. In order to preserve the status quo, Congress passed the stop-gap Act of July 14, 1960, P. L. 86-661, 74 Stat. 527, while this Court granted certiorari and remanded the case to the

District of Columbia Circuit, directing that tribunal to retain jurisdiction until such time as further legislation was enacted. 304 U.S. 297.

That further legislation was the Act of July 10, 1962, P. L. 87-528, 76 Stat. 143, which not only provided a clear statutory basis for continued operations by the supplemental air carriers, by enabling the Board to grant certificates of public convenience and necessity in "supplemental air transportation" (Sec. 401(d)(3), 49 U.S.C. § 1371(d)(3), *infra*, p. 60), but which also defined "supplemental air transportation" in Sec. 101(33) (49 U.S.C. § 1301(33), *infra*, p. 59) as "charter trips in air transportation * * * to supplement the scheduled air service" that the regular route or trunk-line carriers such as respondents are primarily authorized to provide.

As we show immediately below in the discussion of the legislative history of the 1962 Act, Congress did not define the term "charter," in deference to the strong opposition of the regular route carriers to the inflexibility that a statutory definition would entail.

B. LEGISLATIVE HISTORY OF THE ACT OF JULY 10, 1962

The Act of July 10, 1962, P. L. 87-528, 76 Stat. 143, had its origin in two bills prepared by the Board, S. 1969 and H. R. 7318, both 87th Congress, 1st session; see "Statement of Purpose," 107 Cong. Rec. 8929.

The House held its hearings first, on H. R. 7318 as well as on H. R. 7512 (a measure introduced by Mr. Moulder of Missouri at the request of certain supplemental carriers) and on H. R. 7679 (introduced by Mr. Collier of Illinois at the request of the Air Transport Association, representing all of the trunk-line carriers).[2]

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[2] *Limited Air Carrier Certificates.* Hearings before the Transportation and Aeronautics Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 7318, 7512, and 7679, all 87th Cong., 1st sess. Cited as "House Hearings."

Charter was defined in Sec. 1 of H. R. 7512 as "air transportation performed pursuant to an agreement for the entire capacity of an aircraft." Neither of the other bills undertook any definition of charter.

Board Chairman Boyd told the House Committee that the supplemental carriers should be granted charter authority (House Hearings, p. 42), and that the matter of what constituted a charter should be flexible (*ibid.*, pp. 29, 30, 41, 42).

Mr. Burwell, appearing for an association of supplemental carriers, stressed the difficulties his members had encountered in consequence of restrictive interpretations of what was included within the Board's concept of charter (pp. 127-129), asserting that it was narrower than the view held by the Interstate Commerce Commission and by the Maritime Commission (pp. 127-129). He complained that under existing interpretations his members could not compete with foreign airlines (p. 132), stressed that the supplementals' basic need was the development of the charter market (p. 139), and asked the committee to formulate a legislative definition of a charter (pp. 126, 131, 147).

Other witnesses similarly complained of the Board's restrictive definitions of charter (pp. 156, 198, 199), testified that the foreign airlines were getting the charter business in consequence (pp. 156, 190), and repeated their desire for a statutory definition (pp. 166-167, 189, 190).

Thereafter the Subcommittee heard Mr. Tipton, President of the Air Transport Association, who presented the trunk lines' views; he opposed the Board's bills and H. R. 7512, favoring only H. R. 7679 (pp. 204-205, 233), essentially because, in the view of the trunk lines, the proper function of the supplementals lay in the charter field (pp. 228-229). He said (p. 232), "I think the area in which they have conducted their operation is primarily charter, and it is in that area where they have the least adverse impact on the scheduled system."

Mr. Tipton (and his counsel, Mr. Stratton) expressed themselves as favoring the charter definition then contained in the Board's regulations (pp. 230, 231). In a subsequent letter to the Subcommittee, Mr. Tipton reiterated his objections to a legislative definition of charter, saying (pp. 239-240)

> "(1) There is no present need to amend the Federal Aviation Act with respect to the definition of 'charter.' The problem is basically a regulatory one. It is essential to maintain standards of charterworthiness which safeguard against fictitious charters being set up by ticket agents or others who sell individual tickets to the general public. The Board should have appropriate flexibility to control or modify these standards in the light of experience and changing conditions.
>
> "(2) The Board's basic definition of 'charter' has given rise to no serious problems in domestic passenger operations. Conditions in the North Atlantic travel market have necessitated more detailed regulation—and more frequent amendments to the regulation—to prevent individually ticketed operations under guise of charter.
>
> "(3) The attack on the Board's charter regulations as 'unclear' distorts the problem. At the very time the supplementals are trying to lead the committee members to believe the transatlantic charter rules of the Board are 'unclear', one of the supplementals has obtained an extensive new seasonal authorization on the basis that the 'tests of charterworthiness * * * are explicit and well understood.' (See discussion in attached memorandum.) The supplementals are thus trying to have it both ways.
>
> "(4) The proposed definition of 'charter' in H. R. 7512 is defective. It is unclear and, indeed, dangerous. It fails to incorporate any controls to prevent fictitious charters which would actually entail sale of individual tickets to the general public."

In the accompanying memorandum referred to in par. 3 of the foregoing quoted letter, Mr. Tipton said (House Hearings, pp. 240, 243):

> "H. R. 7512 would authorize the supplemental air carriers to perform '* * * (1) unlimited charter opera-

tions on a planeload basis for the carriage of passengers and property in interstate, oversea, and territorial air transportation, with the word "*charter*" herein *being defined as air transportation performed pursuant to an agreement for the use of the entire capacity of an aircraft,* * * *" (Emphasis supplied [in the original]).

* * * * *

"The basic guideline being this clear, an appropriate function of the Board is to prescribe regulations, as needed from time to time, to prevent abuses through ticket agents, solicitation of the general public, or other devices for conducting individually ticketed operations under the guise of 'charter.' There is a substantial danger that an attempt by the Congress to spell out, in full detail, the limits of 'charter' would import an unnecessary rigidity in the field, thus hampering ability of the Board to deal with changing circumstances, as well as entailing extremely detailed legislation.

"For such reasons, our view is that there is no present need for the Congress to undertake a detailed definition of 'charter' in the Federal Aviation Act."

The scene now shifts to the Senate, where hearings followed immediately and were completed well before any legislation was reported out by the House Subcommittee.[3]

The testimony before the Senate Subcommittee was essentially repetitive of what had been said to the House Subcommittee just a few days earlier.

Chairman Boyd expressed the view of his agency that the supplementals should and would engage in further development of the charter markets (Senate Hearings, p. 46), where there was much foreign competition (p. 53). While recognizing that "unlimited charter service would create a real monster" (p. 36) and that it would not be possible to turn charters loose completely (p. 29), he added

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[3] *Supplemental Air Carriers.* Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S. 1969, 87th Congress, 1st session. Cited as "Senate Hearings."

that the Board was reviewing its existing charter policies to see whether they could be liberalized (p. 29).

Mr. Burwell for the supplementals again urged "a clear definition in the act of what is a charter" (p. 103), because of existing restrictive interpretations (pp. 106, 111).

Another witness for the supplementals, Mr. Anton, offered the following statutory definition (p. 185):

> "(13) 'Charter trip' means air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or the movement of property, on a time, mileage or trip basis, in domestic, overseas, intraterritorial or foreign commerce."

Mr. Tipton for the trunk lines again voiced the view that the supplementals should concentrate on the charter business (Senate Hearings, pp. 217, 230-231, 234), while Mr. Stratton, one of the trunk lines' lawyers, engaged in a colloquy with Chairman Monroney. The Chairman expressed impatience "with what appears to be not an effort to encourage the legitimate charter but to prohibit by all possible redtape the proper use of it" (p. 270), whereupon Mr. Stratton said (p. 271) that "this sort of thing is the sort of reason for preserving some flexibility in the Board to modify the rules from time to time in the light of experience."

The Senate Hearings incorporate a memorandum subsequently submitted by Mr. Tipton on behalf of the trunk lines (pp. 274-278), entitled, "THERE IS NO PRESENT NEED FOR A DEFINITION OF 'CHARTER' IN THE FEDERAL AVIATION ACT." In the light of the trunk lines' present position, it seems appropriate to quote the following brief passages from their representative's 1961 memorandum (pp. 277, 278):

> "A noteworthy aspect of the Board's transatlantic charter policy is that it has not been static, but has

changed from time to time in the light of the problems of the day.

* * * * *

"The foregoing summary reviews in only the most general outline the Board's transatlantic charter policy during the past dozen years. It points up, however, a highly important consideration. The policy has been—and quite properly so—responsive to the Board's views of changing needs and changing conditions. This has entailed frequent modification of the definitions, terms, and conditions applicable to transatlantic charters involving noncertificated carriers. Manifestly, these needs and conditions will continue to change. The field is, accordingly, one calling for skilled and intelligent regulatory action, the precise detail of which may vary from time to time. The existing Federal Aviation Act provides an adequate framework for such regulation of 'charter.' As the Board has observed, 'Congress must be taken to have used "charter trips" with the intention of signifying its usual and ordinary connotation, which is merely a flight involving a contract for the entire capacity of the aircraft. * * *' ('Charter Flight Tariff Investigation,' 15 CAB 921, 923 (1952)).

"The basic guideline being this clear, an appropriate function of the Board is to prescribe regulations, as needed from time to time, to prevent abuses through ticket agents, solicitation of the general public, or other devices for conducting individually ticketed operations under the guise of 'charter.' There is a substantial danger that an attempt by the Congress to spell out, in full detail, the limits of 'charter' would import an unnecessary rigidity into the field, thus hampering ability of the Board to deal with changing circumstances, as well as entailing extremely detailed legislation.

"For such reasons, our view is that there is no present need for the Congress to undertake a detailed definition of 'charter' in the Federal Aviation Act."

Although the Senate hearings followed those in the House, the Senate's bill was reported out first. The progress and development of the proposed "charter" definition appears from the several committee prints of S. 1969.

In Committee Print No. 1, July 10, 1961, that definition was formulated in the following terms:

> "(13) 'Charter service' means air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property on a time, mileage or trip basis, but shall not include transportation services offered by an air carrier to individual members of the general public or performed by an air carrier under an arrangement with any person who provides or offers to provide transportation of persons to the general public."

The foregoing definition was continued in Committee Print No. 2, July 14, 1961, except that there was added at the end, separated by a comma, the clause, "other than in connection with all expense-paid tours." There were no additional changes in Committee Print No. 3, July 18, 1961, but in Committee Print No. 4, July 24, 1961, the final clause was changed to read, "other than as a member of a group on an all-expense-paid tour." In that final form, it was reported to the Senate on August 8, 1961 (Sen. Rep. No. 688, 87th Cong., 1st sess., § 101(13) at p. 22).

The cited Senate report, after pointing out that the definition would be applicable to trunk line as well as supplemental carriers (p. 6), included an extensive discussion of Charter Service (pp. 12-14); this appears in full at 91b-172b.[4] It is sufficient here simply to set forth the Senate

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[4] Numbers followed by the suffix "b" refer to the Appendix of Legislative Materials that has been filed as a supplement to the briefs of the several petitioners in all three consolidated cases, Nos. 800, 946, and 969. Except for the pagination, that Appendix is identical with Vol. III of the Joint Appendix used in the court below, which however contains certain inaccuracies that will be pointed out in due course.

Committee's justification for its definition of "charter" (pp. 13-14; 120b-122b):

> "A charter, by common law and general practice in the transportation industry, means essentially the lease of the entire vehicle, in this case the aircraft, for a period of time or for a particular trip. Because the development of the charter market has been inhibited by artificial restrictions which have been imposed by Board regulations on a legal charter, particularly in international air transportation, the committee has incorporated the common law definition of charter in the statutory definitions contained in the Federal Aviation Act. The bill thus provides that—
>
> 'charter service' means air transportation * * * where the entire capacity of one or more aircraft has been engaged * * * on a time, mileage or trip basis * * *'
>
> "However, it is not the intention of the committee to permit individually ticketed service to be offered to the general public under the guise of charter. The proposed statutory definition, therefore, provides that charter shall not include such individually ticketed service whether offered by an air carrier directly or by a travel agent.
>
> "This restriction is subject to one exception because there is one circumstance in which a carrier or travel agent may offer the services to individual members of the public and still conform to the traditional concept of charter. This is in connection with an all-expense-paid group tour. If a travel agent charters an aircraft for an all-expense-paid tour and then offers to individual members of the public the right to participate as a member of the group, this is a very different sort of service from individually ticketed transportation.
>
> "The proposed statutory definition incorporates this exception by providing that charter shall not include transportation offered to individual members of the general public 'other than as a member of a group on an all-expense-paid tour.' The committee has received representations that this exception is open to the abuse that it might be used as a guise to offer individually

ticketed service. However, the Civil Aeronautics Board has ample authority, because of its power to specify the terms, conditions, and limitations of the certificate under section 401 and its general power to make any necessary rules or regulations to carry out the provisions of the act under section 204, to prevent any violation of the clear intent of the statute. This the Board can accomplish by specifying in its regulations the minimum requirements which must be met before the service offered qualifies under the statutory exception.

"However, several members of your committee have expressed the desire that the Board submit reports setting forth its experiences in administering the provision pertaining to all-expense-paid tours. Accordingly, your committee requests the Board to report annually on this subject for the next 3 years, either in a separate report or in its annual report to the Congress. If the Board's experience in administering this section should demonstrate that additional statutory authority is necessary, your committee will expect the Board to incorporate appropriate recommendations to that end in its report."

When S. 1969 as thus reported was reached for consideration, it passed the Senate on August 28, 1961, without further significant debate on the issues now involved (107 Cong. Rec. 17168).

Some two weeks later, the House Committee reported out a fully rewritten H. R. 7318 (H. R. Rep. 1177, 87th Cong., 1st sess.; 17b-90b), which contained no definition of charter, the Committee saying (p. 11):

"The supplementals recommended that a definition of charter be written into the bill and this was given consideration by your committee. The bill passed by the Senate has such a definition.

"Your committee, however, after considering the problem, came to the conclusion that under the circumstances, authority to define charter services should be left, as at present, with the Board, subject to the limitations contained in the reported bill. This is a very

difficult subject and any effort to freeze a definition of charter service into law could well lead to complications."[5]

The House debates (107 Cong. Rec. 20079-20108) throw little light on any issues now pertinent; Mr. Collier, who had introduced H. R. 7679, the only bill that the trunk lines originally approved (House Hearings, pp. 204-205, 233), said that "Basically, the prime service for supplemental carriers is that of charter service" (107 Cong. Rec. 20083); at the end of the discussion, H. R. 7318 was passed, after which it was immediately added as an amendment in the nature of a substitute to S. 1969 (107 Cong. Rec. 20108-20110). Those amendments were so extensive that no conference on the differences was possible in the remainder of the session, and accordingly action was postponed until 1962 (107 Cong. Rec. 20466).

On February 26, 1962, Senator Monroney presented amendments to the House version of S. 1969, which reinstated the final draft of the Senate definition of "charter service" (108 Cong. Rec. 2859-2862). He pointed out that the House had given the Board far less authority in respect of supplemental carriers' individual ticketing authority than the Senate had proposed; that a fatal accident to a supplemental carrier's plane in November 1961 had indicated the need of further regulation;[6] and that accordingly an additional hearing would be held.

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[5] This paragraph is inaccurately reproduced in the Legislative Appendix; the original report does not contain the italics now appearing at 42b.

[6] See *Richmond Air Crash, November 8, 1961.* Hearings before a Special Subcommittee of the House Committee on Armed Services, 87th Cong., 2d sess.; Report of Special Subcommittee, No. 41, February 8, 1962.

At that hearing,[7] the representative of the supplemental carriers, predictably enough, favored the restoration of the original Senate definition of charter service (Sen. Supp. Hearing, p. 42). Shortly thereafter the Committee print of March 8, 1962, included that amendment, and after discussion of other matters, principally the liability insurance provisions of the new version of S. 1969, the rewritten measure was adopted by the Senate and sent to conference (108 Cong. Rec. 3696-3700, 3704-3710).

In the House, a rule became necessary to send the Senate amendments to conference (108 Cong. Rec. 3810, 4019-4023, 4049-4056). One member, Mr. Walter of Pennsylvania, attacked the Senate's charter definition as leading to "phony tours in which the only significant item was the air fare" (108 Cong. Rec. 4050).

Later in March additional conferees were appointed by both Houses (108 Cong. Rec. 4768, 4805), but the conference report did not appear for three more months (H. R. Rep. 1950, 87th Cong., 2d sess., June 28, 1962; 108 Cong. Rec. 12315-12320; 173b-206b).

That report was unanimous, signed by all 17 members of the committee of conference (p. 9; 191b); it dropped the Senate definition of charter (p. 1; 173b-174b); but the Statement of the Managers on the part of the House (pp. 10-17; 192b-206b) says nothing whatever on that point.

On June 29, 1962, the day following, Chairman Harris of the full House Committee on Interstate and Foreign Commerce called up the Conference Report (108 Cong. Rec. 12315), after which he yielded to Chairman Williams of the Subcommittee (p. 12321) to "explain some of the

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[7] *Regulation of Supplemental Air Carriers.* Hearing before the Aviation Subcommittee of the Senate Committee on Commerce on proposed amendments to the House substitute amendment to S. 1969, 87th Cong., 2d sess. Cited as "Sen. Supp. Hearing."

background of the provisions included in this conference report." Mr. Williams then said (p. 12321):

> "To cover the high spots of the bill the Senate receded in its definition of 'charter.' The House did not have a specific definition of 'charter' but left that up to the Civil Aeronautics Board to define. It is presumed they will use the same definition they have been using throughout the years."

Mr. Walter asked (p. 12322) what happened to the charter definition; Mr. Williams replied that—

> "The Senate receded and accepted the position of the House on that provision. So, there is no statutory definition of 'charter' in the bill. That definition will be the one which is presently in effect under a regulation of the Civil Aeronautics Board. The all-expense tours that were provided for in the Senate definition were not accepted by the House, and the Senate receded and concurred in our position on that, also.".

Mr. Harris then resumed the discussion (p. 12322), saying that the bill contained no definition of "charter"; that, "As explained in the House report, we felt the Board should be in a position to deal effectively with any efforts to abuse the meaning of charter;" and, finally, in a separate statement, that "the regulatory agency needs some flexibility to modify its regulations to guard against any new subterfuges that may emerge. For this reason, the House committee objected to any attempt to freeze into the act a definition of charter service which would prevent the Board from dealing effectively with the abuses. Thus the bill, as pased by the House, contained no definition of charter."

The foregoing discussion appears at 229b-233b, but not quite accurately, inasmuch as the Legislative Appendix fails to reflect that the statement read by Mr. Harris appears in the Congressional Record in smaller type (108 Cong. Rec. 12322; 231b-232b).

Thereafter Mr. Collier read, as a speech of his own, the statement that Mr. Harris had just finished reading (108 Cong. Rec. 12324; 232b-233b). Mr. Harris's statement and Mr. Collier's speech are absolutely identical, word for word.

The Conference Report was then adopted by the House by a vote of 338-0 (108 Cong. Rec. 12325-12326).

On the same day, June 29, Chairman Monroney called up the Conference Report in the Senate (108 Cong. Rec. 12282-12283), pointing out preliminarily that it "contemplates a supplemental air carrier industry much more limited in terms of its role in air transportation than that which was envisaged by the committee and endorsed by the Senate.

> "The conference report adopts the provision of the House bill limiting the permanent role of these carriers to charter service. * * *"

Briefly, at the time of the hearings on the bill, the Board had permitted the supplemental carriers not less than ten flights a month with individually ticketed passengers, but its authorizations had twice been set aside for want of specific findings. *American Airlines* v. *Civil Aeronautics Board,* 235 F. 2d 845 (D.C. Cir.); *United Airlines* v. *Civil Aeronautics Board,* 278 F. 2d 446 (D.C. Cir.). The Senate would have eliminated any requirement for these findings, permitting the Board to make generalized findings. But the conference report provided for a two-year phase-out of all individually ticketed transportation by the supplemental carriers, limiting them to charter service almost exclusively.

After explaining the reasons underlying the foregoing provisions of the conference report, Chairman Monroney continued (108 Cong. Rec. 12283; 235b-236b):

> "The charter definition contained in the Senate version of the bill was omitted from the bill agreed to by the conferees. This was done unilaterally by the Senate conferees because of the decision which had been made on individually ticketed authority. The charter definition would have operated to prohibit the granting of split charters—that is, the transportation of more than one charter group in a single aircraft. We felt that the Board should be left free to determine on its merits the desirability of permitting the supplemental carriers to conduct such charters, in view of the fact that the charter business will ultimately represent the only source of revenue for these carriers. Another reason why we desired to leave the Board sufficient flexibility so that it might permit split charters was the effort of the Defense Department to encourage these carriers to acquire modern turbine-powered equipment for the civil reserve air fleet. The size of such aircraft makes it virtually impossible to find a charter group sufficiently large to fill an entire aircraft."

Then followed comments by Senators Cotton, Scott, and Thurmond, all three of whom were signatories of the Conference Report (108 Cong. Rec. 12283-12285), to the effect, though with varying emphases, that the elimination of the Senate's definition of charter meant that the Civil Aeronautics Board had no latitude to adopt the Senate definition administratively, that the definitional flexibility with which it was invested specifically excluded any power on its part to adopt that particular definition. These views appear in full at 236b-239b.

The Senate then agreed to the Conference Report without a record vote (108 Cong. Rec. 12285), and the bill was signed by the President on July 10, 1962.

C. PROCEEDINGS BEFORE THE BOARD

Following approval of the Act, the Board instituted the *Supplemental Air Service Proceeding* (Docket 13795) to dispose of pending applications for certificates to engage in supplemental air transportation (1a, 2a). The applications to be considered in that proceeding proposed not only domestic service, but also, with the exception of the transatlantic service to be considered below, service from the United States to all parts of the world (8a). Accordingly, there was only one agency proceeding, even though under the Act the Board's orders in respect of international orders required Presidential approval to become effective, while those involving only domestic service became effective immediately.

From the inception of the proceeding, to which all three of the present respondents were parties on their allegation of competitive interest, a basic issue was whether the Board had statutory power to authorize inclusive tour charters (3a, 19a). In statutory terms, that issue was whether inclusive tour charters are properly comprehended within the words "charter trips in air transportation" as they appear in Sec. 101(33) of the Act (49 U.S.C. § 1301(33), *infra*, p. 59). The examiner, in his recommended decision embraced applications for both domestic and foreign operating capacity, concluded that the Board had statutory power to authorize inclusive tour charters, and he recommended grant of such authority (49a-311a).[8]

It is now necessary to revert to the one matter excepted from the foregoing proceeding, supplemental air transportation across the Atlantic; applications to provide such service were at issue in *Translatlantic Charter Investiga-*

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[8] The examiner's opinion concludes at 206a; it is followed by recommended orders, recommended regulations, and an appendix discussing in detail the financial and technical qualifications of the several applicants.

tion (Docket 11908), which had been instituted earlier (617a-618a), and which had been partially decided before issuance of the examiner's decision in *Supplemental Air Service Proceeding*.

The Board had found in *Transatlantic Charter Investigation* (777a-780a) that three supplemental carriers should be certificated to engage in supplemental air transportation across the Atlantic. It determined, as a matter of discretion, that transatlantic charter authority should not "at the present time" include inclusive tour charters, but authorized the successful applicants to engage in "split charters," i.e., dividing the capacity of an airplane between two charterers. Its authority in the latter aspect, challenged by all three of the present respondents, was subsequently sustained in *American Airlines* v. *Civil Aeronautics Board*, 348 F. 2d 349 (D.C. Cir.).

The President approved the Board's decision to award certificates to two of the supplemental carriers, but returned the matter to the Board for further evaluation of the fitness of the third; and he did not take final action on the Board's recommendation regarding the supplemental carriers' applications to the extent that they sought authority to provide inclusive tour charters. Thus, at the time the *Supplemental* case was ready for argument before the Board, the inclusive tour charter phase of the *Transatlantic* case had not been finally determined (892a). Accordingly, the Board directed consolidated oral argument on the inclusive tour charter issue in both cases, after allowing the parties in the *Transatlantic* proceeding to file briefs and to indicate whether further hearings were required (960a-962a).

On March 11, 1966, following the consolidated oral argument, the Board simultaneously adopted three sets of orders, all of which held that it had statutory power to authorize inclusive tour charters and that it should exercise that authority.

One of these orders (E-23350; 332a-484a; for the opinions proper, see 334a-384a) disposed of the applications for domestic operating authority in the *Supplemental Air Service* case, and it was released immediately.

In its opinion in that case, the Board dealt at length with the inclusive tour charter issues, concluding that it had statutory power to authorize such services and that they should be authorized for an experimental period of five years; the Board agreed with and generally adopted the examiner's findings on these issues (100a-124a, 181a-192a [examiner's discussion]; 336a-346a, 349a-356a [Board's opinion]). This authorization was embodied in Part 378 of the Board's special regulations, issued with its order (414a-436a), which defined and regulated inclusive tour charters; the precise restrictions imposed are set forth in detail below, pp. 24-29.

On the issue of statutory authority, the Board pointed out that the inclusive tour charter fell within the legal concept of charter operations, inasmuch as this Court had held that motor carriers under the Interstate Commerce Act might charter their buses to travel agents, i.e., "brokers," for the transportation of all-expense tours. *National Bus Traffic Ass'n, Inc.* v. *United States*, 352 U.S. 1020, affirming 143 F. Supp. 689 (D. N. J.).

The Board also relied on *American Airlines* v. *Civil Aeronautics Board*, 348 F. 2d 349 (D.C. Cir.), which had held that it was empowered to authorize "split charters." The court had there held (348 F. 2d at 354) that Congress intended to leave the interpretation of the words "charter trips" largely to the Board, and that "the legislative history reveals that a prime concern of Congress was to maintain the integrity of the charter concept—to preserve the distinction between group and individually ticketed travel, within those limits it is for the Board to evolve reasonable definitions."

The Board also rejected the contentions of the present respondents that selected excerpts from the legislative history indicated that a prohibition against inclusive tour charters was to be read into the statute, this on the view that the statute had been authoritatively interpreted in the split charter case, and that the authority now granted did not offend against the distinctions between group and individually ticketed travel. (336a-346a.)

Finally, the examiner found that inclusive tour charters would meet a substantial public need for low-cost pleasure air travel not otherwise available, and that the inclusive tour authorization would strengthen the supplemental carriers economically without having a material adverse effect on the regular route carriers (129a-136a). Inclusive tour charters, which had not previously been provided in the United States, are designed to attract income groups not now using scheduled airline services for vacation travel; the examiner after analyzing the British experience with such charters, noted that they had "been highly successful in opening up a sizeable new traffic market of persons not previously using air service, to the primary benefit of the low or middle income individual who would not otherwise fly" (118a).

While there could be no precise prediction of the results of this largely experimental type of service, the examiner found that the effect of normal market growth and the stimulation resulting from the inclusive tour and split charters would be to improve materially the supplementals' overall civil passenger charter revenues without significant diversion from the scheduled carriers. He concluded that most tour traffic that might be obtained by the supplementals "would be newly generated rather than diverted from existing services," and that the authorization posed "no significant threat to the certificated route carriers" (134a-135a).

The Board agreed, making additional findings that rejected the present respondents' claims of adverse impact, particularly as contrasted to "the substantial public benefits which we foresee from the new class of service" (348a-349a).

It is now appropriate to turn to the other two orders issued by the Board on March 11, 1966, which dealt with international operations, which therefore required Presidential approval to become effective, and which under Section 801 of the Act (49 U.S.C. § 1461; *infra*, p. 60) could not be publicly released prior to action by the President.

Both of these other orders—or, more accurately, sets of orders—relied entirely on Order E-23350, the domestic service proceeding, in respect of the issue of the Board's statutory power to authorize inclusive tour charters. One of these involved the international phases of the *Supplemental Air Service* case (Orders E-24237-39, 543a-609a), the other dealt with the inclusive tour issues with respect to the two carriers who had previously received certificates in the *Transatlantic Charter Investigation* case (Orders E-24240-41, 1060a-1096a; *supra*, p. 20).

A little later, on April 5, 1966, the Board adopted another opinion in the *Transatlantic* case, awarding similar authority to four additional supplemental carriers (Order E-24242, 1097a-1104a). Here again this opinion and order were not published, but were submitted for the President's consideration together with the two March 11 decisions that had similarly dealt with international operations.

On September 27, 1966, the President approved all three of the foregoing orders (565a, 1082a, 1106a), and they were released to the public three days later (543a, 1060a, 1097a).

D. THE BOARD'S INCLUSIVE TOUR CHARTER REGULATIONS

Under the Board's regulations, inclusive tour charters are severely limited to insure their being entirely different from the normally individually ticketed point-to-point service provided by the respondents.

1. Basic Restrictions

Inclusive tour charters are restricted to services meeting all of the following conditions:

(a) The tour price can be no lower than 110% of the lowest available fare, including stopover charges, that the trunk line carriers offer "for individually ticketed service on the circle route beginning at the point of origin, to the various points where stopovers are made, and return to the point of origin" (§ 378.2(b)(4), 417a-418a; CAB Op., 351a-354a).

(b) Each inclusive tour is required to be performed to a minimum of three stops, not including the point of origin, each stop to be not less than 50 air miles apart (§ 378.2(b)(2), 417a; CAB Op. 352a-353a: "The three-stop requirement will, in our judgment, increase the emphasis on the tour aspect of the package and will provide further assurance against the tours being used as a subterfuge for individually ticketed service between the originating city and the major city of destination.").

(c) "A minimum of seven (7) days must elapse between departure and return" (§ 378.2(b)(1), 417a).

(d) Every inclusive tour operation must, by definition, be performed on a round-trip basis (§ 378.2(b), 416a).

(e) The tour price of an inclusive tour "shall include, at a minimum, all hotel accommodations and necessary air or surface transportation between all places on the itinerary including transportation to and from air and surface

carrier terminals utilized at such places other than the point of origin" (§ 378.2(b)(3), 417a; CAB Op., 353a, ¶ (b)).

(f) Every inclusive tour must be operated by a regulated tour operator who charters aircraft for such tours from a certificated supplemental air carrier (§ 378.2(a) as amended, 1096a).

2. Supervision of Tour Operators

The regulations prescribe that, before any inclusive tour charters may be operated, as well as during the operation and after its conclusion, the Board must be fully informed, and they similarly provide that the Board retains maximum control; here are the details:

(a) Prior approval of the inclusive tour proposal must be obtained from the Board both by the tour operator and by the supplemental carrier involved (§§ 378.10, 378.11(a), 420a; CAB Op., 350a-351a). (This requirement was scheduled to lapse on January 1, 1968, but it has since been extended to extend through the calendar year 1968. §§ 378.10 and 378.18(a) as amended, 32 Fed. Reg. 11986, 11987.)

The Board's justification for the foregoing requirement was in these terms (355a):

> "With respect to the 'prior approval' procedure, prospective tour operators will be required to file a statement containing a detailed picture of their experience, business structure, financial condition and the like (§ 378.12). In addition the regulation sets forth the factors which the Board will consider in determining whether a tour operator applicant is properly qualified to engage in inclusive tour operations (§ 378.11(d))."

(b) The application must include, among other data, a Statement of Tour Operator's Qualifications and the Tour Prospectus (§ 378.11(b) as amended, 539a-540a).

(c) The Statement of Tour Operator's Qualifications requires detailed information regarding incorporation; stock

ownership; citizenship of owners or of directors and stockholders; prior business experience of company, officers, managers, and key personnel; operating authority issued to applicant by United States Government; financing arrangements; and the applicant's most recent balance sheet (Appendix, 430a-433a as amended at 541a).

(d) The Tour Prospectus requires copies of the charter contract and of the contract between the tour operator and the tour participants; the tour operator's surety bond (433a-436a); and the following information (§ 378.13, 422a-423a):

(i) Proposed date and time of each flight;

(ii) Equipment to be used, including the aggregate number of each type of aircraft and capacity;

(iii) Tour itinerary, including name of hotels and length of stay at each and sightseeing or other arrangements if any;

(iv) Tour price per passenger;

(v) Number of persons expected to participate in tour;

(vi) Charter price of the aircraft;

(vii) Individually ticketed air fare, computed as provided in § 378.2(b)(4) [417a-418a];

(viii) Samples of solicitation material proposed by the tour operator, with a requirement that all advertising and solicitation materials employed by the tour operator shall state the name of the supplemental air carrier to be utilized.

(e) Each application must be jointly verified by the supplemental carrier and the tour operator, and filed 90 days in advance of the operation (§ 378.11(a), 420a).

(f) Each application must be served on each direct air carrier serving the points involved in the proposed tour operation, and such direct carriers may object to such

inclusive tour charters within ten days thereafter (§ 378.11 (c), 421a).

(g) The sale of inclusive tour charters by supplementals are restricted to tour operators granted indirect air carrier authority by the Board under § 378.1 as amended (1095a-1096a) and § 378.3 (418a-419a), and such authority may be suspended by the Board without a hearing (§ 378.6, 420a).

(h) No supplemental air carrier may perform any inclusive tour charter trips unless it has on file with the Board "a currently effective tariff showing all rates, fares, and charges for such charter trips and showing the rules, regulations, practices, and services in connection with such transportation" (§ 378.15, 423a).

(i) All tour operators operating inclusive tours must furnish a surety bond in the amount of at least twice the charter price (§ 378.16, 424a-425a; for the form of bond, see 433a-436a).

(j) "The charter contract between the tour operator and the supplemental carrier shall evidence a binding commitment on the part of the carrier to furnish the air transportation required for the tour or tours covered by the contract" (§ 378.14, 423a).

(k) The contract between the tour operator and the tour participants must be non-discriminatory, and must include provisions concerning method of payment; refunds; carriers' liability limitations for passengers' baggage; aircraft equipment substitutions; seating accommodations; and non-performance of tour because of insufficient participants (§ 378.17, 425a).

(l) Finally, the Board requires a joint post-tour report by the supplemental air carrier and the tour operator to show whether or not the tours as authorized were in fact performed, and whether there were any deviations from the operations authorized or described (§ 378.20(a) as amended, 541a).

3. Split Charters Prohibited on Inclusive Tours

Under Part 208 of the Board's Economic Regulations, "Terms, Conditions and Limitations of Certificates to Engage in Supplemental Air Transportation," a charter flight includes a charter for less than the entire capacity of an aircraft. § 208.3(s)(2)(ii)(b), 449a. This is the so-called "split charter," the legality of which was sustained in *American Airlines* v. *Civil Aeronautics Board,* 348 F. 2d 349 (D.C. Cir.).

Similarly, under Part 295 of the Board's Economic Regulations, "Transatlantic Supplemental Air Transportation," half of an aircraft may be chartered by one group and the other half by another. § 295.2(b)(iii)(2) as amended, 1092a.

But where inclusive tour charters are involved, plane capacity may not be thus divided: "'Inclusive tour charter' means the charter of an entire aircraft by a tour operator for the carriage by a supplemental air carrier of persons traveling in air transportation on inclusive tours." § 378.2(a) as amended, 1096a.

4. Temporary Nature of Inclusive Tour Authority

All the supplemental carrier certificates involved in this case have been issued for temporary experimental periods; these extend to April 18, 1969, for transatlantic authority (e.g., 1076a, 1109a, 1112a, 1115a, 1118a), or to November 26, 1971, for all other international authority (e.g., 568a, 571a, 574a, 576a-577a, 579a-580a, 583a, 586a, 589a, 592a, 594a-595a).

The reason for such merely temporary authority was set forth by the Board in its *Transatlantic* opinion (1076a):

> "We will thus be afforded a test period, following which we shall review the tour program to see if it has fulfilled its promise. In the meantime, the Board's

rule making powers will enable it to modify the terms and conditions governing the tour operations if that is necessary in order to protect other segments of the air transportation industry."

E. JUDICIAL REVIEW

The question whether the words "charter trips" in Sec. 101(33) of the Act (49 U.S.C. § 1301(33), *infra*, p. 59) are broad enough to comprehend inclusive tour charters, the central issue herein, has been before the courts twice.

The domestic inclusive tour charter order (E-23350, 332a *et seq.; supra*, pp. 21-23) was challenged by the present respondents in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 365 F. 2d 939 (D.C. Cir.). As the court there said (p. 941),

> "It is the uncertainty over the meaning of the term 'charter trips' which prompts the necessity for interpretation of the statute, particularly as to whether such term embraces 'inclusive tour charters.'"

The District of Columbia Circuit reviewed both the legislative and administrative history of the Act of July 10, 1962, concluding in favor of the Board's interpretation with these words (365 F. 2d at 948-949):

> "We believe that, if the statements of the floor managers are considered in the light of the foregoing analysis, and sight is not lost of the fact that the legislators did not in fact have the Board's regulations before them when the Act was passed; the Board's interpretation of its statutory power comports with the overall statutory intention of Congress. Although specific conflict does exist to some degree between the statements on the floors of the houses, and the Act itself and the House committee report, much of that conflict is dissipated by the above analysis of the evil apprehended by the legislators and the measures adopted by the Board to prevent its occurrence. Any remaining conflict must give way to the generally accepted maxim of statutory construction that reports by

> the legislative committees responsible for formulating the legislation must take precedence in event of conflict over statements in the legislative debates on the floors of the houses of Congress.''

The court also noted that the foregoing conclusion was in accord with its earlier ruling upholding the Board's split charter regulation, *American Airlines, Inc.* v. *Civil Aeronautics Board,* 348 F. 2d 349, 354 where it had said, after an earlier review of the identical legislative history (quoted in part, 365 F. 2d at 949, as follows):

> '' 'We are unable to conclude that the term charter trips has a fixed meaning or that Congress intended to restrict the Board to a definition of one aircraft—one charter. We conclude that Congress intended, although not without limits, that the Board should be free to evolve a definition in relation to such variable factors as changing needs and changing aircraft; * * * We agree with the Board that the legislative history reveals that a prime concern of Congress was to maintain integrity of the charter concept—to preserve the distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions.' ''

The present respondents then took affirmative steps to seek review here of the District of Columbia Circuit's adverse decision in the domestic inclusive tour charter case, only to abandon such action and, instead, to seek review in the court below of the orders now in issue, those entered in respect of international inclusive tour charters.

The Second Circuit rejected the Board's contention that respondents were barred by the doctrine of collateral estoppel from relitigating the same interpretation of ''charter tours'' in the Act that the District of Columbia Circuit had just decided against them; rejected all of the Board's contentions based on *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.,* 333 U.S. 103; and held, on a review of the precise legislative history earlier considered by the District

of Columbia Circuit that "it was in fact manifested in a congressional declaration binding on both the Board and this court, that was clearly intended to forbid the Board to authorize inclusive tours." *Pan American World Airways, Inc.* v. *Civil Aeronautics Board,* 380 F. 2d 770, 781 (C.A. 2); 1119a-1143a.

As already noted, this Court has granted certiorari to resolve the conflict.

SUMMARY OF ARGUMENT

I. A. It is familiar learning that, where Congress does not define a particular term in a regulatory statute, the regulatory agency created to administer that statute is free to adopt a meaning for such term that is consistent with the statute and that will further the statutory scheme.

Here the word "charter" had been in the governing statute since 1938, and the Board had frequently given differing interpretations thereto, subject only to the significant element of the charter concept, viz., the maintenance of a clear differentiation between group and individually ticketed travel. In defining "charter trips" in Section 101(33) of the Act to include inclusive tour charters under rigorously prescribed conditions, the Board here was simply following this Court's holding under the Motor Carriers' Act in *National Bus Traffic Ass'n* v. *United States,* 352 U.S. 1020, affirming 143 F. Supp. 689 (D. N. J.). Significantly, the Board has several times denied inclusive tour charter applications that omitted in any respect the rigidities of a group itinerary.

Finally, it is significant that, unlike other regulatory agencies, the Civil Aeronautics Board is under an affirmative statutory duty to promote, develop, and encourage air transportation, and that the inclusive tour charter orders now being challenged were adopted for a test period of five years on a designedly experimental basis.

B. The Board's definition of "charter trips" to include inclusive tour charters is consistent with the statute, it preserves the administrative flexibility urged on the Congress by the respondent trunk line carriers, it is consistent with the flexibility preferred by the prevailing House report, and it lacks the rigidity that the Senate's rejected definition of "charter" would have required.

The trunk lines now argue, not that omitting a legislative definition would further administrative flexibility, which was their position before the committees, but rather that the considered omission of such a definition has resulted as a matter of law in precluding administrative flexibility. This about-face, the record shows, was triggered by the Board's order which, following termination of the legislative hearings and the passage of differing versions of the pending measure by House and Senate, directed consideration of the inclusive charter tour issue.

C. On the basis of the normal and usual indicia of legislative intention—the positions of the contending parties, the several Committee reports, the omission of any legislative definition from the Act—it is clear that the Board was free to vary its definition of "charter" from time to time.

D. But the court below improperly and impermissibly varied the clear import of the legislative history because of remarks made on the floor of both houses that were inconsistent with both the Conference Report and the language of the statute.

This was improper, because at variance with multiple warnings by this Court not to rely on remarks of the measure's opponents, particularly where the legislation in question involved accommodation between strong economic forces locked in conflict.

The remarks made in the House just before the Conference Report was adopted reflect an outside source and

are self-contradictory. The remarks made in the Senate similarly reflect an outside source, are inconsistent with what the Committee Chairman said there, are not based on any of the antecedent legislative materials, and plainly were never approved by the House. What is involved, therefore, is synthetic legislative history, fashioned with a view to favorable use in the future, which cannot properly be given any weight whatever in ascertaining the meaning of the statute.

The District of Columbia Circuit was accordingly right in holding that nothing said on the floor of either house at the time of the adoption of the Conference Report precluded either split charters (*American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F. 2d 349) or inclusive tour charters for domestic operations (*American Airlines, Inc.* v. *Civil Aeronautics Board*, 365 F. 2d 939).

Affirmance here would not only unsettle the law, it would force American residents seeking to fly abroad on inclusive tour charters to use foreign supplemental air carriers exclusively.

II. Since the orders now being challenged were approved by the President, they are not subject to judicial review under the doctrine of *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, a decision which, though rendered by a closely divided Court, has never been reconsidered here. But the court below, following the District of Columbia Circuit, held that the *Waterman* doctrine does not preclude judicial review to determine whether the Board had statutory power to make the order it did.

That view espouses in significant part the view of the *Waterman* minority that the Court rejected. But it is not necessary to determine the question of power in any situation where the case under consideration is not appropriate

for the exercise of the power, assuming it to exist. *Ex parte Bakelite Corp.*, 279 U.S. 438, 448.

Here none of the challenges made to the present orders by the respondents have any merit. Point I shows that the substantive challenge is not well taken, while the procedural objections raised by the respondents in the court below are quite devoid of substance.

Accordingly, without reaching the *Waterman* doctrine, the Court may properly sustain the Board here on the footing that, assuming power to review, the present objections to the orders in question are wholly untenable.

ARGUMENT

Despite the circumstance that the words "charter trips" in Section 101(33) of the Act were never defined or limited by Congress, in part certainly because the respondent trunk line carriers argued strongly against any legislative definition thereof, the court below has held, in reliance on demonstrably unreliable legislative history, that Congress so far intended to curb the cognizant regulatory agency's powers as to forbid carefully restricted charters of entire aircraft where such charters included members of an indivisible group on an all-expense tour.

We shall show that, on familiar principles, the deliberate refusal of Congress to define the scope of "charter" meant that the Civil Aeronautics Board was free to expand and contract the content of that word on a case-to-case basis, in the normal and usual context of administrative regulation; that the definition it evolved after protracted hearings, circumscribed by detailed if not indeed onerous restraints, was not only consistent with the statute but effectuated the Congressional intention of precluding supplemental air carriers from regularly engaging in individually ticketed operations; and that the court below, in finding in the legislative materials a blanket prohibition against inclusive tour charters that neither the language

of the statute nor the terms of any of the committee reports supported, was guilty of disregarding this Court's repeated admonitions as to the dangers of relying on floor debates to vary the meaning of an Act of Congress as explained in the committee reports.

Indeed, we shall demonstrate when and why the respondent trunk line carriers, who had urged on both Congressional committees the desirability of leaving the Board free to vary its administrative definitions of "charter" from time to time, in preference to having Congress define "charter" by statute, suddenly did an about-face, so that, below and in this Court, they now argue that the Board was forbidden by law to include inclusive tour charters within the statutory words "charter trips."

I. THE BOARD'S STATUTORY MANDATE TO AUTHORIZE "CHARTER TRIPS IN AIR TRANSPORTATION * * * TO SUPPLEMENT SCHEDULED SERVICES" IS AMPLY BROAD ENOUGH TO ENCOMPASS THE INCLUSIVE TOUR CHARTER AUTHORITY HERE IN QUESTION

A. Whenever a Particular Term in a Regulatory Statute Is Not Defined by the Legislature, the Regulatory Agency Is Free To Adopt a Meaning That Is Consistent With the Statute and That Will Effectuate the Statutory Purpose.

It is familiar learning that, where Congress does not define a particular term in a regulatory statute, the regulatory agency created to administer that statute is free to adopt a meaning for such term that is consistent with the statute and that will further the statutory scheme.

As this Court said in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 220:

> "Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved."

And again in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203:

> "The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulations of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions."

Here, as in the very recent case of *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, the agency determination "is entitled to acceptance unless it lies outside the range of permissible choices contemplated by the statute;" courts should take that determination "as their starting point and * * * set aside this determination only when it lacks reasonable support in relation to the statutory purpose * * *." And, only the other day, the Court reversed a court of appeals that "indulged in an unwarranted incursion into the administrative domain." *Securities and Exchange Comm.* v. *New England Elec. System*, No. 305, this Term, decided March 5, 1968, p. 5 of slip opinion.

By way of background it should be noted that, although the word "charter" has been in the governing statute since 1938 (Section 401(f) of the Civil Aeronautics Act of 1938, c. 601, 52 Stat. 973, 989), it has never been defined by Congress; as has been se[illegible] (*supra*, pp. 7-10), the respondents' representative strongly urged Congress not to adopt a statutory definition; the Senate's version of the bill, which contained such a definition, was rejected by the House, which proposed to leave the definition of charter to the Board, as before; and the Conference Report in this respect agreed completely with the House and eliminated the Senate's statutory definition.

On many occasions before passage of the 1962 Act, the Board had defined "charter" in many varying contexts—

as an incident of regulating the fares and/or operating authority of the scheduled route carriers (*Free and Reduced Rate Transportation,* 14 C. A. B. 481, 489, 510; *Pan American World Airways IATA Agreements,* 23 C. A. B. 275, 280-281; *IATA Agreements, Group Excursion Fares,* 26 C. A. B. 755, 756), of foreign route carriers (*Foreign Off Route Charter Service Investigation,* 27 C. A. B. 196, 202), of supplemental air carriers (*ACTA-IMATA Commercial Charter Exchange Investigation,* 22 C. A. B. 760), and of indirect air carriers (*International Air Freight Forwarders Investigation,* 27 C. A. B. 658, 668-669).

As early as 1958, the Board made it clear that its definition of charter would be governed, not by "conceptual niceties," but rather by the "essential elements" of this type of air transportation. *International Air Freight Forwarders Investigation,* 27 C. A. B. 658, 668-669. And, within that framework, the definition has been frequently modified to promote the overall statutory objectives in what is assuredly one of today's most dynamic industries. Indeed, these rules were re-examined, redefined, and amplified almost annually beginning in 1950.[9]

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[9] 1950: CAB Statement of Action on Applications for Permission to Carry Groups on Special Transatlantic Charter Trips, May 20, 1950; issued wth CAB Press Release 50-28.

Policy Statement on Transatlantic Air Travel for 1950, December 6, 1949; issued with CAB Press Release 49-99.

1955: The 1955 Transatlantic Charter Policy, 20 C.A.B. 782 (1955).

Regulation Policy Statement No. 1, 20 Fed. Reg. 4117 (1955), effective May 25, 1955, codified as amended as 14 C.F.R. 399.

1957: Regulation Policy Statement No. 2, 22 Fed. Reg. 2241 (1957), effective April 4, 1957, codified as 14 C.F.R. 399.28.

[continued overleaf]

Even prior to the award of inclusive tour authority, the Board's charter regulations sanctioned the charter of aircraft by persons offering space thereon to the general public as part of a group travel program. Section 295.2 (k) and 295.2(m) of the Board's Regulations (see 903a for the first and 14 C.F.R. for the second) and predecessor provisions have expressly authorized the supplemental carriers to charter aircraft to persons responsible for organizing study tours in which the participants engage in a formal academic study course abroad. (Sections 208.3(q) and 208.3(r), as they now appear in 14 C.F.R., are to the same effect.) In essential characteristics, there is exact identity between such long-established study tour charters and the inclusive tour charters here challenged.

1958: Regulation Policy Statement No. 3, 23 Fed. Reg. 214 (1958), effective Jan. 7, 1958, codified as 14 C.F.R. 399.28 and 14 C.F.R. 399.29.

Regulation Policy Statement No. 5, 23 Fed. Reg. 7063 (1958), effective November 5, 1958, codified as 14 C.F.R. 399.30.

1959: CAB Econ. Regs. ER-273, 24 Fed. Reg. 4907 (1959), effective June 26, 1959, codified as 14 C.F.R. 295.

1960: Regulation Policy Statement No. 11, 25 Fed. Reg. 5327 (1960), effective June 29, 1960, codified as 14 C.F.R. 399.30.

CAB Econ. Regs. ER-305, 25 Fed. Reg. 5322 (1960), effective June 29, 1960, codified as 14 C.F.R. 295.

CAB Econ. Regs. ER-312, 25 Fed. Reg. 7673 (1960), effective September 9, 1960, codified as 14 C.F.R. 295.33.

1961: CAB Econ. Regs. ER-326, 26 Fed. Reg. 3628 (1961), effective April 28, 1961, codified as 14 C.F.R. 295.

1962: Regulation Policy Statement No. 12, 27 Fed. Reg. 693 (1962), effective February 1, 1962, codified as 14 C.F.R. 399.36.

Regulation Policy Statement No. 13, 27 Fed. Reg. 4732 (1962), effective May 18, 1962, codified as 14 C.F.R. 399.37.

The only restrictions that the Board imposed, in this case as well as in all the others, were those adapted to preserve, in its words, "the significant element of the charter concept," namely, "the maintenance of a distinction between group and individually-ticketed travel" (867a).

It was because the Board maintained that essential distinction that it was successively upheld by the District of Columbia Circuit in the split charter case and in the domestic inclusive tour charter case. *American Airlines* v. *Civil Aeronautics Board,* 348 F. 2d 349; *American Airlines* v. *Civil Aeronautics Board,* 365 F. 2d 939.

In concluding that its existing statutory authority to authorize charter trips was amply broad enough to authorize all expense tours, the Board relied (338a-340a) on this Court's decision in *National Bus Traffic Ass'n* v. *United States,* 352 U.S. 1020, affirming 143 F. Supp. 689 (D. N. J.), which upheld the Interstate Commerce Commission's ruling that a tour operator offering all-expense tours, not distinguishable from those authorized here, was not required to utilize motor carriers who would be authorized by the Commission to sell individual tickets to passengers, but rather was free to utilize motor carriers licensed to engage in charter services.

As the district court said in that case (143 F. Supp. at 695):

> "It must be conceded by the plaintiffs * * * that a preformed group of travelers—for example, the members of a golf team or of an orchestra—may lawfully charter a bus for a tour. The Commission thought that Tauck's patrons, traveling and sightseeing together have a 'community of interest' about the equivalent of that of a preformed group; that, therefore, if a collective contract for transportation be effective for its group by Tauck such a contract may be deemed to be a true 'charter' ".

And again (143 F. Supp. at 696-697):

> "Though the individual membership certificates do entitle each individual Tauck patron to transportation

> and in this sense are 'tickets', a good deal more than bare individual transportation is involved. The tour is attractive because it is a group adventure * * * The important thing is that the Tauck group is a cohesive whole interested in a tour for pleasure, and not in mere transportation."

That decision, it is proper to note, antedated by nearly six years the enactment of Section 101(33) of the Federal Aviation Act.

As we have shown (*supra*, pp. 24-29), the Board's regulations governing inclusive tour charters are very comprehensive and detailed; they may indeed be onerous; but all of their provisions are designed to—and do—effectuate a clear and sharp differentiation between group travel involved in inclusive tour charters, and the individually-ticketed transportation which supplemental air carriers such as petitioners are no longer authorized to offer on a permanent basis.

In the language of the examiner here (111a-112a),

> "Existing all-expense tours, like those which might be offered and sold on a charter basis through travel agents, have appealing features for passengers of a particular temperament, including relative economy of price, the payment of one sum for the entire package, the companionship of likeminded tourists, relief from the burdensome detail of reservations, avoidance of baggage transfers, etc. In the international field there are additional advantages, such as minimizing the necessity for coping with the often cumbersome customs procedures and the difficulties of unfamiliar languages and currencies."

Those findings were adopted by the Board (336a), which added this further explanation of the group character of inclusive tour charters (344a-345a; italics added):

> "The use of the charter mechanism, combined with the restrictions which we are imposing by regulation, necessarily results in a service to the public which is

different in significant respects from that available on scheduled services. In exchange for realizing the price savings accruing from the economies of planeload charter operations, *the charter tour passenger is subjected to the rigidities of a group itinerary,* must be willing to travel and share facilities with strangers, and must agree to the necessary regimentation that is entailed in group travel. Nor will he have the freedom to select from the multiple daily schedules offered by route carriers, but will be confined to predetermined departure and arrival times selected by the tour operator. Moreover, it is clear that the specially tailored type of service to be provided is not one which could practicably be furnished by route carriers on their scheduled operations. * * * For all these reasons, we find that, no less than in the case of traditional planeload charters, inclusive tour charters are 'supplemental' within the meaning of Section 101(33)."

It is significant that, since the adoption of the detailed inclusive tour charter regulations (Part 378, set out in detail, *supra,* pp. 24-29), the Board has already dismissed or denied no less than eight applications for statements of authorization for failure to comply with Part 378.[10]

Of the orders issued by the Board in response to such applications, one of the most significant is that which denied an application for a tour group which proposed to travel together from New York to London, Brussels and Paris, this portion of the journey occupying one week; at Paris the tour members were to disperse on various individual itineraries involving work or study assignments in Europe; and thereafter they would reassemble at Paris about two months later for travel via London to New York. The Board denied that application in its Order E-26222

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[10] Order E-26222 dated January 4, 1968; Order E-25056 dated April 27, 1967; Order E-24723 dated February 6, 1967; Order E-24661 dated January 23, 1967; Order E-24660 dated January 23, 1967; Order E-24586 dated December 30, 1966; and Order E-24382 dated November 9, 1966.

dated January 4, 1968, because it failed to comply with an essential ingredient of the inclusive tour concept, namely, "planned group travel." The Board thus reaffirmed the requirement of the "rigidities of a group itinerary" in order to distinguish this new program from individually ticketed service.

Two final points should be emphasized.

First, as the examiner pointed out, citing *Braniff Airways* v. *Civil Aeronautics Board,* 147 F. 2d 152 (D. C. Cir.); *American Airlines* v. *Civil Aeronautics Board,* 192 F. 2d 417 (D. C. Cir.); and *Delta Air Lines* v. *Civil Aeronautics Board,* 247 F. 2d 327 (C. A. 5), Section 102 of the Federal Aviation Act (49 U.S.C. § 1302; *infra,* p. 59) imposes affirmative duties on the Board. He said (138a-139a, footnotes omitted):

> "The Board's function under the Act is not simply one of providing a kind of after-the-fact regulation by correcting demonstrated service deficiencies and fulfilling existing service demands shown on a factual record; nor is its role confirmed to that of an impassive arbiter of conflicting private interests. Rather, the Act affirmatively invests the Board with the duty to consider, as being in accordance with the public convenience and necessity, the 'promotion,' 'development,' and 'encouragement' of air transportation. This mandate imposes duties which are peremptory, and in compliance with it the Board, with judicial approval, has experimented widely in authorizing new and largely unchartered operations. And while the Board is not to exercise its certification power in aid of purely private interests, improving the economic strength of an individual carrier or carriers is a legitimate and often utilized consideration where such strengthening is an incident to achievement of the public interest.
>
> "In exercising its developmental responsibilities the Board of necessity must rely to a substantial extent on its evaluation of the future; otherwise, no new and previously untried service would ever be provided.

> The fact that such an evaluation involves liberal amounts of prophesy and judgment does not make it any less firm a basis to support certification, for the provisions of the Act embodying the declaration of policy 'are as much an enactment by Congress as is any other section of statute.' What is essential is that the record contain a 'hard core of factual possibility' which will undergird the exercise of a particular judgment."

Second, the orders now being challenged are frankly and designedly experimental, to provide a test period of from two to five years (349a; *supra,* pp. 21, 28-29).

B. The Board's Definition of "Charter Trips" to Include Inclusive Tour Charters Is Consistent With the Statute and Preserves the Administrative Flexibility Urged on the Congress by the Respondent Trunk Lines

The words "charter trips" in Section 101(33) are not defined in the Act. But as the Tauck Tours case (*National Bus Traffic Ass'n.* v. *United States,* 352 U.S. 1020, affirming 143 F. Supp. 689 (D. N. J.)), had been decided some six years earlier, it is appropriate to invoke the rule—or, at very least, the presumption—of statutory construction that when Congress used the words "charter trips" in 1962 it intended them to carry over the judicial interpretation of "charter" in the Interstate Commerce Act. E.g., *United States* v. *Merriam,* 263 U.S. 179, 187.

It is particularly to be recalled that the trunk lines, such as respondents, strongly urged both Committees of Congress not to define "charter" but to leave that definition to the Board in the interest of administrative flexibility (*supra,* pp. 7-10); and that the House Committee, responsive to those views, rejected the Senate's definition of charter—passed by that body before the House Committee reported—and instead concluded that "authority to define charter services should be left, as at present, with the Board, subject to the limitations contained in the reported

bill." H. R. Rep. No. 1177, 87th Cong., 1st Sess., p. 11; *supra,* p. 13.

The bill as passed by the House contained no limitation on the Board's power to define "charter" from time to time, while the bill as twice passed by the Senate gave the Board no leeway whatever: In the Senate version, a charter by definition included "a group on an all-expense-paid tour" (*supra,* p. 11), which the Committee report noted was embraced within "the traditional concept of charter" (*supra,* p. 12).

In conference, the Senate definition was dropped; in the Conference Report, this circumstance was not specifically mentioned. Accordingly, the statute as passed left the Board free as before to narrow or broaden its charter concepts, and in the light of the Tauck Tours case that concept, plainly enough, could properly embrace all-expense tours. In short, the 1962 Act gave the Board all of the flexibility for which the trunk line carriers had contended, and which the House Committee had recommended.

Now, however, the trunk lines have changed their position, and are arguing against flexibility. Their present contention is, and these new views were adopted by the court below, not that omitting a legislative definition of charter would further administrative flexibility, but rather that the considered omission of such a legislative definition has precluded administrative flexibility as a matter of law.

This startling about-face can be explained by the relationship between the chronology of the legislation and that of the administrative proceedings giving rise to the orders now being challenged.

Mr. Tipton on behalf of all the trunk lines (including the present three respondents) wrote the House Committee on June 30, 1961, in opposition to any definition of "charter."

House Hearings, pp. 239-243, quoted in part at pp. 7-8, *supra*.

On the same day, he testified before the Senate Committee (Senate Hearings, pp. 181, 193), after which the Chairman announced that the record would be held open one week to receive amplifying statements (p. 274). Mr. Tipton's statement, entitled "THERE IS NO PRESENT NEED FOR A DEFINITION OF 'CHARTER' IN THE FEDERAL AVIATION ACT," excerpts from which have already been quoted (*supra*, pp. 9-10), appears immediately afterwards (Senate Hearings, pp. 274-278). Accordingly that statement could not have been prepared later than July 7.

Then came the event that triggered the trunk lines' somersault. On October 18, 1961, in the *Transatlantic Charter Investigation*, which was under way while the differences between the House and Senate versions of the supplemental air carrier bill still remained unresolved, the Board placed at issue the question whether all-expense tour charters should be authorized; it said (646a-647a):

> "On the other hand, we cannot agree that the proposals in this proceeding should be limited to the traditional concept of transatlantic charters or to charters as defined in Part 295. However, we would expect such proposals to fall within the broadly accepted meaning of charters, viz, the lease of an entire vehicle on a time, mileage, or trip basis. This would not preclude proposals which contemplate charters by professionals engaged in the formation of groups for transportation (travel agents) currently prohibited under Part 295 of the Economic Regulations. In other words, the chartering of an aircraft by a travel agent and the offering by such agent to the general public of all-expense group tours would be within the scope of the issues in this case."

From that moment forward, when the trunk lines first had reason to fear that the Board's "flexibility" might be exercised in favor of the supplemental air carriers

rather than against them, the trunk lines changed their tune. Since that time the trunk lines have contended that, when Congress acceded to their urging not to define "charter" in the Act, this was the operative circumstance that froze for all time the Board's earlier definition of the scope of a charter—and this without a single word on that subject either in the Act or in the Conference Report.

We shall now proceed to demonstrate that the District of Columbia Circuit was correct in holding that the legislative history of the 1962 Act does not support the trunk lines' changed position, and that the court below committed egregious error in deciding the contrary.

C. As a Matter of Straightforward Reading of Legislative History, It Is Plain That the Refusal of Congress to Define "Charter" Left the Board Quite as Free as Before to Redefine That Term From Time to Time

If we concentrate on the normal and usual indicia of legislative intention, it is plain from the expressed positions of the contending parties, from the several committee reports, and from the omission of any statutory definition from the Act, that the Board was free to vary its definitions of "charter" from time to time. Indeed, it is not difficult to establish that conclusion on a virtually syllogistic basis:

1. The supplemental carriers complained of the Board's restrictive administrative definition of charter and urged a broader and more comprehensive statutory definition; the Senate adopted such a definition, for reasons set forth in the Senate Committee Report (*supra*, pp. 12-13).

2. The trunk lines, satisfied with the course of the Board's rulings in charter cases up to then, urged that no statutory definition be adopted lest the Board's administrative flexibility be thereby impaired; and the House in consequence refused to include any statutory definition, here

also for reasons set forth in the House Committee report (*supra*, pp. 13-14).

3. The Conference Report dropped the Senate's definition, but without comment.

4. The statute speaks only of "charter trips."

Therefore, 5, the Board following passage of the statute retained its existing administrative flexibility to define and redefine "charter," certainly as long as it maintained a discernible distinction between charter travel and individually ticketed travel. Q. E. D. And the District of Columbia Circuit, reviewing the legislative history of two separate occasions at the instance of the present respondents, has arrived at this precise conclusion. *American Airlines* v. *Civil Aeronautics Board*, 348 F. 2d 349; *American Airlines* v. *Civil Aeronautics Board*, 365 F. 2d 939.

D. The Court Below Improperly and Impermissibly Varied the Clear Import of the Legislative History Because of Remarks Made on the Floor That Were Inconsistent With Both the Conference Report and the Language of the Statute

The heart of the error of the court below lies in its disregard of warnings frequently voiced by this Court in the course of decisions involving statutory interpretation.

First, this Court has urged caution in relying on casual and scattered remarks emanating from one or the other side in the course of debate on a statute representing a legislative compromise and accommodation between strong economic forces in vigorous conflict. *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179-180; *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 619; *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 99-100. Here the 1962 Act was, as has been shown in detail, the legislative culmination of years of struggle between the trunk lines and the supplemental carriers.

Second, this Court has frequently warned against relying on the views of legislative opponents of a measure. *Woodwork Manufacturers* v. *NLRB,* 386 U.S. 612, 639-640; *Labor Board* v. *Fruit Packers,* 377 U.S. 58, 66; *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 394-395. Here, as will be shown, a good many of the restrictive remarks deemed controlling by the court below emanated from members of Congress hostile to the supplemental carriers.

Third, the report of the house whose version was ultimately adopted is more persuasive of the intended meaning of the bill. See *Steiner* v. *Mitchell,* 350 U.S. 247, 254. Here the views of the House of Representatives prevailed in the 1962 Act, and consequently the explanation in the House Committee Report, which stated that "authority to define charter services should be left, as at present, with the Board," is entitled to the greatest weight.

And, fourth, opinions of particular members at variance with the Committee reports are not to be taken as expressing the Congressional purpose. *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 125.

With those observations by way of background, we turn to what was said on the floor at the time of the adoption of the Conference Report to ascertain whether any of those remarks were competent to vary the plain scope of the statute as interpreted in the Conference Report or in the prevailing Committee Report.

Taking the House first, we may properly discount anything said there by Mr. Walter (*supra,* page 15), because this gentleman so far opposed the supplemental carriers that he introduced a bill that would have eliminated them completely from the national air transportation system. H. R. 11132, 87th Cong., 2d sess.

The comments made by Mr. Williams (*supra,* page 16), "It is presumed that they [the Board] will use the same

definition they have been using throughout the years," and that, without any statutory definition of charter, "That definition will be the one which is presently in effect under a regulation of the Civil Aeronautics Board," involve, it is submitted, a *non sequitur*. Not only were those comments quite inconsistent with what Mr. Harris said, to the effect that "the regulatory agency needs some flexibility" (*supra*, p. 16), but, as has been seen (note 9 at pp. 37-38 *supra*), the Board had been redefining "charter" virtually on an annual basis.

In this connection it is also significant that the statement Mr. Harris read, and the speech Mr. Collier made, are identical, word for word.

Mr. Harris was reading a prepared statement, Mr. Collier used the same statement as the substance of a speech (*supra*, pp. 16-17). Obviously, what both are recorded as saying had a common outside source—a classic example of manufactured legislative history, of legislative history made with a view to its favorable use in the future. Compare *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384.

Consequently the Harris-Collier statement is entitled to little if any weight, quite apart from its internal inconsistencies, which derive from the contrast between its advocacy of flexibility in one paragraph and its emphasis on the existing concept of charter in another.

If, as four members of the six constituting the majority in *United States* v. *Florida*, 363 U.S. 121, 132, urged, Congress looks to the text of the statute rather than to the fine print, it is extremely unlikely that the 338 Representatives who approved the Conference Report, simply because of what Messrs. Williams and Harris said, considered that the new Act was in consequence freezing for all time the then current administrative definition of "charter." Far from there being any legislative enactment of settled agency

construction, the formal reports of the House Committee emphasized flexibility—and the Conference Report significantly failed even to intimate inflexibility. In those circumstances, neither Mr. Williams' "It is presumed," etc., nor the statement that was twice read on the floor, amount to a legislative straitjacket that would forever paralyze the Board's future treatment of charters—particularly when one considers the Board's very fluid practice in that area (*supra*, note 9 at pp. 37-38).

The remarks made in the Senate when the Conference Report was considered reflect a similar contrast and inconsistency between flexibility and rigidity.

Chairman Monroney emphasized the need for flexibility, pointing out that the Senate's definition of charter would have precluded split charters, a concept that he saw as desirable in view of the trend towards larger aircraft (*supra*, pp. 17-18).

Senators Cotton, Scott and Thurmond, on the other hand, presented an opposite view. Senator Scott, differing with the Chairman, asserted that the bill as agreed to in conference precluded split charters (108 Cong. Rec. 12284). And all three urged, with varying emphasis, that the Board was required to adhere to existing charter concepts, and that it was specifically forbidden to authorize charters for all-expense tours (108 Cong. Rec. 12283-12285).

We submit that what these three Senate conferees said can be given no weight, much less controlling significance, and this for a number of reasons.

First, their remarks are at variance with what was said about flexibility by both Committee Chairmen, Senator Monroney and Mr. Harris. Certainly it cannot be argued that these three conferees were more properly "the managers" or "in charge of the bill" than the two chairmen; any such assumption simply disregards legislative realities.

Second, obviously nothing said on the floor of the Senate came to the attention of the 338 House members who voted to adopt the Conference Report on the same day; those members were voting what appeared in the Conference Report, and—at least presumptively—what had earlier appeared in the House Report. Their action on the House side plainly did not involve ratification of a few Senators' remarks that were, on their face, at variance with the printed materials actually under consideration.

And, third, the remarks of the three Senate conferees are not competent to vary the terms of either the Conference Report or of the statute itself, which leave no room whatever for any such limitation as those Senators expressed. There will on occasion be scope for difference of opinion as to whether a Conference Report is competent to deflect the apparent meaning of an Act of Congress; that was the issue on which this Court divided in *Commissioner* v. *Acker*, 361 U.S. 87. But floor remarks can never vary both the Conference Report and the Act. This is not a situation where the floor debates clarify or illumine a point left ambiguous at best in the Conference Report, the situation in the decisions relied on by the court below—*First Nat. Bank* v. *Walker Bank*, 385 U.S. 252, 258-260; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320-323. Here the precise contrary appears. Here the floor discussion seized on by the court below not only created an ambiguity not therefore present, it flatly contradicted the plain meaning of the Conference Report. No decision of which we are aware—other than the one now under review—sanctions such distorting use of floor debates.

Finally, the combination of three tell-tale factors—the similarity of the three conferees' remarks, the complete lack of any foundation for the substance of those remarks anywhere in the antecedent legislative materials, and the striking inconsistency between those remarks and those materials—strongly suggests, here also, not only a common

outside source but also its corollary, the synthetic legislative history carefully formulated with an eye to the future.

In short, not to labor the matter in more detail, the conclusion is inescapable that the court below applied inadmissible standards of legislative interpretation, and thus gave utterly improper scope to scattered remarks in one house of Congress, remarks all too clearly reflecting views not derived from the legislative materials, in order to limit the unrestricted powers in which the statute had advisedly confirmed the regulatory agency.

Accordingly, when the split charter came before the District of Columbia Circuit, that tribunal sustained the Board, saying (*American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F. 2d 349, 354):

> "We are unable to conclude that the term charter trips has a fixed meaning or that Congress intended to restrict the Board to a definition of one aircraft-one charter. We conclude Congress intended, although not without limits, that the Board should be free to evolve a definition in relation to such variable factors as changing needs and changing aircraft; whatever the limits on the Board's power of definition, those limits are not breached by a definition which permits two groups to charter one half an aircraft each. We can find nothing in the statute or the legislative history or in principle that should freeze the definition of 'charter' to the capacity of standard aircraft of a particular vintage. We agree with the Board that the legislative history reveals that a prime concern of Congress was to maintain the integrity of the charter concept—to preserve the distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions. In today's swift engineering developments as to size and speed of aircraft a definition embalmed, for example, in such origins as the admiralty law growing out of the sailing vessel era would be an unreasonable and unnecessary restraint on the Board and one we do not find in the statute or its history."

Similarly, the same court sustained the validity of domestic inclusive tour charters after careful review of the legislative history that we have just presented. It said (*American Airlines, Inc.* v. *Civil Aeronautics Board*, 365 F. 2d 939, 948-949):

> "We believe that, if the statements of the floor managers are considered in the light of the foregoing analysis, and sight is not lost of the fact that the legislators did not in fact have the Board's regulations before them when the Act was passed, the Board's interpretation of its statutory power comports with the overall statutory intention of Congress. Although specific conflict does exist to some degree between the statements on the floors of the houses, and the Act itself and the House committee report, much of that conflict is dissipated by the above analysis of the evil apprehended by the legislators and the measures adopted by the Board to prevent its occurrence. Any remaining conflict must give way to the generally accepted maxim of statutory construction that reports by the legislative committees responsible for formulating the legislation must take precedence in event of conflict over statements in the legislative debates on the floors of the houses of Congress. * * *"

It seems proper to consider the consequences that would follow affirmance of the judgment below.

Such an outcome, quite apart from the harm it will do to established concepts of judicial review and of statutory construction, will have an adverse effect on the balance of payments problem as well.

For, in the event of affirmance, the present petitioners will be forbidden to conduct overseas inclusive tour charters, and as a matter of *stare decisis*, so will every other American supplemental air carrier.

But two foreign charter carriers now have 5-year authority to carry passengers from this country to Europe on inclusive tour charters. *Caledonian Airways (Prestwick) Ltd.*, Order No. E-25017, approved by the President April

19, 1967; *Transavia, N. V.*, Order No. E-26136, approved by the President December 16, 1967.[11]

Consequently American residents of limited means who wish to see Europe by the most inexpensive and convenient way, i.e., via an inclusive tour charter, will not be able to do so on an American supplemental air carrier, they will perforce be required to travel on foreign-flag charter carriers.

The demand for inclusive tour charter accommodations is strong, and it is growing; as the examiner said (111a), "it is clearly apparent that such traffic is nowhere near its true potential." In foreign countries, inclusive tour charter services "have enjoyed wide public acceptance and have exhibited remarkable growth" (113a; see also, generally, 113a-124a).

If American residents travelling to Europe by air on inclusive charter tours are restricted to foreign-flag charter carriers, which would be the result in the event of affirmance in this case, then some part of those residents' expenditure, though not much, will remain here, to be applied to the carriers' expenses in this country; but the profit from the operation will, necessarily, be transmitted to the carriers' headquarters abroad.

So the economic variable in the ultimate result to be reached in the present case is simply a question whether a greater or a smaller portion of the money paid by the American tourist for an inclusive charter tour will remain in the United States.

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[11] *Wardair Canada, Ltd.*, Order No. E-26137, approved by the President December 16, 1967, has authority for inclusive tour charters to Canada; while *Sudflug, Suddeutsche Fluggesellschaft m.b.H.*, Order No. E-24697, approved by the President January 30, 1967, has authority to conduct inbound inclusive tour charters from Europe to the United States. See *Pan American World Airways, Inc.* v. *Civil Aeronautics Board*, D. C. Cir., Nos. 20860 and 21149, decided January 31, 1968.

II. THERE IS NO OCCASION IN THIS CASE TO REEXAMINE THE SCOPE OF THE WATERMAN DOCTRINE

In *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, a closely divided Court held that Board orders involving international operations, which under § 801 of the Act (49 U.S.C. § 1461; *infra*, pp. 60-61) required Presidential approval as a condition precedent to their taking effect, were not subject to judicial review, essentially because they involved foreign affairs, an area in which the President alone could speak for the Nation.

In the 20 years since that case was decided, its doctrine has not been reexamined here, and *Waterman* has been cited by this Court only by way of illustration.

In the lower Federal courts, however, the *Waterman* doctrine of non-reviewability has been substantially narrowed. The District of Columbia Circuit in the split charter case held that it did not preclude judicial review where the issue was whether the Board had statutory power to make the order that it did (*American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F. 2d 349), and in the inclusive tour charter cases, both the District of Columbia Circuit as well as the court below followed the same rationale. *American Airlines, Inc.* v. *Civil Aeronautics Board*, 365 F. 2d 939 (D. C. Cir.); *Pan American World Airways* v. *Civil Aeronautics Board*, 380 F. 2d 770 (C.A. 2).

We cannot forbear to remark that the District of Columbia Circuit and the Second Circuit have both, certainly in significant part, espoused the reasoning of the minority in *Waterman* that the Court rejected. But, for reasons about to be stated, we believe that there is no occasion now to reexamine the scope of the *Waterman* doctrine with a view either to limiting or to reaffirming it.

First, as we have shown at great length in Point I above, the Board clearly had power to authorize these petitioners to make inclusive tour charters; there is no need even to summarize, much less repeat, what we have already argued at length.

Second, the alleged procedural deficiencies advanced by the respondents below are quite without substance and indeed verge on the frivolous, as we can easily demonstrate.

Respondents contended below that the Board erred (1) in awarding inclusive tour authority without calling for a further hearing as allegedly required under the doctrine of *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, and (2) in adverting to traffic and financial reports regularly filed by respondents and to other data officially noticed by the Board.

Those contentions are quite untenable, for a number of reasons.

First, inasmuch as they were not raised before the Board but were first adduced in the court below, they are barred by Section 1006(e) of the Act (49 U.S.C. § 1486(e); *infra*, p. 61).

Second, the Board here did not terminate existing authority embodied in a certificate that had already been issued, it awarded new authority as its final action in a continuing proceeding in which full hearings had been held. The *Delta Air lines* case is accordingly entirely inapplicable.

Third, respondents pointedly failed to specify in their briefs below the alleged prejudicial errors committed by the Board, or the contrary factual showing that respondents would have been prepared to make. Cf. 5 U.S.C. § 556(e).

For further details concerning these contentions, we adopt and incorporate by reference all that the Board has said in Point II of its brief in No. 946.

The result is that, even assuming solely for purposes of argument that the Board's orders being challenged in the present proceeding are as fully subject to judicial review as though they had involved only domestic operations, they would still require affirmance on their merits, with the consequent reversal of the judgment below.

Accordingly, this is a case for the application of the technique of *Ex parte Bakelite Corp.*, 279 U.S. 438, where petitioners sought a writ of prohibition. A unanimous Court left open the issue of its power to grant the relief requested, because clearly of opinion that such relief should not be granted. The Court said (p. 448, footnotes omitted):

> "'The power of this Court to issue writs of prohibition never has been clearly defined by statute or by decisions. And the existence of the power in a situation like the present is not free from doubt. But the doubt need not be resolved now, for, assuming that the power exists, there is here, as will appear later on, no tenable basis for exercising it. In such a case it is admissible, and is common practice, to pass the question of power and to deny the writ because without warrant in other respects.'"

So here: The Court may properly pass the question of judicial power under the *Waterman* doctrine, and to sustain the Board on the footing that the present challenges to the international orders involved herein, both substantive and procedural, are wholly untenable and without warrant.[12]

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[12] Interestingly enough, this was the precise course pursued by the District of Columbia Circuit in a recent contest between two of the respondents here and a foreign charter air carrier. *Pan American World Airways* v. *Civil Aeronautics Board,* Nos. 20860 and 21149, decided January 31, 1968, pp. 3-4 and note 4 of slip opinion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed, with instructions to affirm the Board's orders.

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APPENDIX

Statute Involved

The pertinent provisions of the Federal Aviation Act of 1958 as amended are as follows:

1. *§ 101. Definitions* [49 U.S.C. § 1301]

As used in this Act, unless the context otherwise requires—

* * * * *

(33) "Supplemental air transportation" means charter trips in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to section 401(d)(1) and (2) of this Act.

2. *§ 102. Consideration of matters in public interest by Board* [49 U.S.C. § 1302]

In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to be recognized and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or

advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

3. *§ 401. Certificate of public convenience and necessity —Essentiality* [49 U.S.C. § 1371]

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * * * *

(d)(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.

4. § 801. *The President of the United States* [49 U.S.C. § 1461]

The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate

authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

5. § 1006. *Judicial Review—Orders subject to review; petition for review* [49 U.S.C. § 1486]

(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.